

2001

State of Utah v. Daneil Duane Etherington II : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. : Case No. 20010308-CA
 :
 DANIEL DUANE ETHERINGTON II, :
 :
 Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF ASSAULT BY A PRISONER, A
THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §
76-5-102.5 (1999); IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH, THE HONORABLE LYNN W.
DAVIS PRESIDING

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IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellee, :
v. : Case No. 20010308-CA
DANIEL DUANE ETHERINGTON II, :
Defendant/Appellant. :

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of assault by prisoner, a third degree felony, in violation of Utah Code Ann. § 76-5-102.5 (1999); in the Fourth Judicial District Court, Utah County, State of Utah, the Honorable Lynn W. Davis presiding. This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(e) (1996).

**STATEMENT OF ISSUE PRESENTED ON APPEAL
AND STANDARD OF APPELLATE REVIEW**

Issue: Is defendant's conduct of using a table to slam a deputy into a wall more specifically governed by the assault by prisoner statute than by the assault on a correctional officer statute, which requires that the defendant "throw[] or otherwise propel[]" an object at the deputy?

Standard of Review: This issue is one of statutory interpretation. “Questions of statutory interpretation are questions of law, which we review for correctness giving no deference to the trial court’s interpretations.” *State v. Paul*, 860 P.2d 992, 993 (Utah App. 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 76-5-102.5 (1999)—Assault by prisoner.

Any prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree.

Utah Code Ann. § 76-5-102.6 (1999)—Assault on a correctional officer.

Any prisoner who throws or otherwise propels fecal material or any other substance or object at a peace or correctional officer is guilty of a class A misdemeanor.

Utah Code Ann. § 76-5-102 (Supp. 2001)—Assault.

(1) Assault is:

- (a) an attempt, with unlawful force or violence, to do bodily injury to another;
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
- (c) an act, committed with unlawful force or violence, to do bodily injury to another.

...

STATEMENT OF THE CASE

Defendant was charged by information with assault by prisoner, a third degree felony, and criminal mischief, a class A misdemeanor. R. 5A. Following his preliminary hearing, defendant moved to amend the information from assault by prisoner to assault on

a correctional officer, a class A misdemeanor. R. 35-50. The trial court denied defendant's motion. R. 62-65.

At trial, defendant moved for a directed verdict as to the criminal mischief charge. R. 70-72. He also moved for a jury instruction on the lesser included charge of assault on a correctional officer. R. 70-72, 92. The court granted both motions. *Id.* Following the trial, the jury convicted defendant of assault by prisoner. *Id.*

Defendant was sentenced to the statutory indeterminate prison term of zero-to-five years. R. 113-15. He timely appeals the trial court's denial of his motion to amend the information. R. 121-25.

STATEMENT OF THE FACTS¹

Defendant, an inmate at the Utah County Jail, repeatedly used personal items in his cell including paper, toothpaste, and his bedding to cover the lens of the security camera located in his cell. R. 144:84-85, 96-99.² Defendant's actions were considered security violations. R. 144:78, 84, 100. Although defendant was warned to cease his destructive behavior, he continued to disobey jail rules. R. 144:98-99.

On October 19, 2000, due to defendant's continued misbehavior, Deputy Gregory

¹The facts are recited in a light most favorable to the jury's verdict. *See State v. Loose*, 2000 UT 11, ¶ 2, 994 P.2d 1237.

²Due to his prior misbehavior, defendant was housed in solitary confinement at that time. R. 144:73-74, 79-80, 94-95. Video cameras are placed in the solitary confinement cells to prevent inmates from harming themselves or destroying jail property. R. 144:79-80, 96.

Knapp, a disciplinary officer, conducted a tape recorded disciplinary hearing with defendant. R. 144:55-57, 75-76. The hearing was held in an eight foot by ten foot interview room inside the jail. R. 144:57. The door, located on the west side of the room, contained a viewing window three feet high and two feet wide. R. 144:57-58, 105. Inside the room was a heavy table measuring four feet long and two-and-a-half feet wide, two chairs, and a tape recorder. R. 142; 144:57-58, 67.

When the hearing began, Deputy Knapp sat in the chair across the table from defendant, nearest the east wall. R. 144:58. Defendant was seated opposite to Deputy Knapp, in the west chair with his back to the door. *Id.* The door was shut during the interview. *Id.* For security reasons, Deputy Brian Casper and three other officers, witnessed the interview through the door window from the hallway outside the room. R. 144:105-06.

Deputy Knapp initiated the interview by informing defendant of the allegations against him and of his rights in answering the allegations. R. 144:58-59.³ However, when given the opportunity to respond to the allegations, defendant refused, stating that he would appeal the deputy's decision. R. 144:59-61. Defendant also refused to call witnesses, stating that he had witness statements but that he would not show them to Deputy Knapp. R. 144:60. Defendant's demeanor was argumentative throughout the hearing. R. 144:61.

³Deputy Knapp, an experienced hearing officer, conducted the disciplinary hearing according to jail policy. R. 144:60-61, 74-75, 98. Defendant had been through other disciplinary hearings and was presumably familiar with the hearing process. *See id.*

Given defendant's failure to refute the allegations, Deputy Knapp found defendant guilty of committing the allegations and breaking jail rules. R. 144:61-62. Deputy Knapp then informed defendant that all the items used to cover the security camera would be removed from defendant's cell. R. 144:63. At that point, defendant became extremely agitated and yelled, "You touch any of my personnel [sic] stuff, when we get back [to my cell], I'm going to break your neck, straight up. Those are my personal, legal papers[.]" R. 144:63, 106. The deputy attempted to calm defendant by explaining that he would not negotiate with defendant, and that defendant's personal items were already being removed from his cell. R. 144:64. In response, defendant raised a few inches out of his chair, leaned toward the deputy, and yelled "If you touch them, it is against the law and I have a right to use force to defend them. You will be in a fight, if you start this shit[.]" R. 144:64, 106. Deputy Knapp instructed defendant to sit back down. R. 144:64. Still arguing, defendant complied. *Id.*

Deputy Knapp then informed defendant that he had the opportunity to earn his possessions back through good behavior. R. 144:64-65. Clenching his fists above the table, defendant yelled "There is f[uck]ing legal documents, discoveries [sic], and I've got an f[uck]ing trial coming up in twenty f[uck]ing days. If you f[uck]ing touch it, you are going to get your f[uck]ing ass kicked[.]" R. 144:65-66. Fearing that defendant would attack him, Deputy Knapp again tried to calm defendant by reiterating that his possessions had already been removed from his cell and that he could earn them back. R. 144:66-67.

At that instant, defendant moved his hands under the table, and forcefully tipped the table into the deputy's lap. R. 144:67. As Deputy Knapp fell from his chair, defendant shoved the table against the deputy, slamming him into the east wall. R. 144:67-68. Trying to keep his balance and to push defendant away, Deputy Knapp placed his left hand on the east wall and his right hand on defendant's throat. R. 144:67-69. Despite the deputy's efforts, defendant continued to use the table to force Deputy Knapp against the wall. R. 144:68. The force of defendant's actions caused one of the heavy metal table legs to break off. R. 142; 144:67.

Upon viewing defendant's actions through the door window, Deputy Casper and the other officers immediately entered the room and restrained defendant. R. 144:70, 106-12. Later, defendant was given a medical examination for a minor scratch on his neck. R. 144:72, 126-27. Deputy Knapp was unhurt in the incident. R. 144:72.

At trial, Deputy Casper testified that he saw defendant place his hands under the table and then stand up, bringing the table up with him. R. 144:107.⁴ He then observed defendant "driving his legs forward towards [sic] [Deputy] Knapp with the table." *Id.*

Defendant also testified at trial. R. 144:118-44. When asked about his actions on direct examination, defendant admitted that he "got up a little bit quick and [] knocked the

⁴Although Deputy Casper initially described defendant's actions in his report as "throwing the table," on cross examination he explained that by "throwing" he meant that defendant "turn[ed]" the table, "bringing [it] up off the ground" into Deputy Knapp. R. 144:112-13.

table over because [he] had [his] hands in [his] lap.” R. 144:125. Defendant further explained his actions to the jury by stating, “I stood up . . . and I kind of pushed [the table] over, and pushed [it] a little bit. And then when it was in my way, I just kind of picked it up a little bit . . . and I pushed it against [Deputy Knapp] to get him to let me go.” *Id.* Defendant also described his action as “overturn[ing]” the table. R. 144:128. On cross-examination, defendant admitted that he “grabbed [the table] and tipped it over.” R. 144:135-36. He also stated that “the table was turned over” and that he “got upset and flipped over the table.” R. 144:136-37, 142. Defendant never claimed to have thrown or propelled the table into Deputy Knapp. R. 144:118-44.

ARGUMENT SUMMARY

Defendant was charged with assault by prisoner, a third degree felony, for threatening a deputy, overturning a table onto the deputy’s lap, and then using that table to slam the deputy into a wall. On appeal, defendant claims that his conduct more specifically fit within the offense of assault on a correctional officer, and that under *State v. Hill*, the trial court erred in denying his motion to amend the information to the lesser charge. Defendant’s reliance on *Hill* is misplaced. Defendant’s conduct of overturning a table onto a deputy’s lap and slamming him into a wall does not fit within the narrow “throws or otherwise propels” element of section 76-5-102.6—assault on a correctional officer. Rather, his acts fit more specifically the elements of assault by prisoner—he assaulted the deputy with a table with the intent to cause bodily injury.

ARGUMENT

DEFENDANT’S CONDUCT FELL MORE SPECIFICALLY WITHIN THE ELEMENTS OF ASSAULT BY PRISONER, AND NOT WITHIN THE ELEMENTS OF ASSAULT ON A CORRECTIONAL OFFICER AS DEFENDANT CONTENDS.

Defendant claims that his conduct fell more specifically under assault on a correctional officer, a class A misdemeanor, and that the trial court should have therefore granted his motion to amend the information. Br. of Aplt. at 8-9.⁵ Defendant relies on *State v. Hill*, 688 P.2d 450 (Utah 1984) to support his argument. Br. of Aplt. at 9-10.

In *Hill*, the defendant received \$2,100 in cash from an undercover agent for one ounce of baking soda, which the defendant claimed was “good” cocaine. *See Hill*, 688 P.2d at 451. Hill was convicted of second degree felony theft by deception, and appealed on the ground that his conduct was more specifically covered by a statute prohibiting distribution of an imitation of a controlled substance. *See id.* The Supreme Court agreed, largely on the ground that the Controlled Substances Act contained a specific section making its provisions controlling over any other conflicting statutory provision. *See id.* The Court concluded that “when an individual’s conduct can be construed to be in

⁵Before the trial court, defendant argued that under *State v. Shondel*, 453 P.2d 146 (Utah 1969), the assault by prisoner and the assault on a correctional officer statutes proscribe essentially the same conduct, and therefore, he claimed that he was entitled to the lesser offense. *See R.* 35-50. However, defendant has abandoned that claim on appeal. *See SME Industries, Inc. v. Thompson, Ventulette, Stainback and Associates, Inc.*, 2001 UT 54, ¶ 46 n. 12, 28 P.3d 669 (arguments abandoned on appeal are waived and should not be addressed).

violation of two overlapping statutes, the more specific statute governs.” *Id.*

Contrary to defendant’s claim, his conduct is more specifically covered by the assault by prisoner statute, and not by the assault on a correctional officer statute. *See State v. Chaney*, 1999 UT App 309, ¶¶ 40-43, 989 P.2d 1091 (distinguishing *Hill*).

A. Defendant’s conduct of using a table to slam the deputy into a wall does not fit within the elements of assault on a correctional officer.

When determining an issue of statutory interpretation, “[an appellate court] begin[s] [its] analysis by examining the plain language of the applicable statutes and appl[ies] other methods of statutory interpretation only when the language is either ambiguous or inconsistent.” *State v. Mast*, 2001 UT App 402, ¶ 10, 40 P.3d 1143 (quotations and citations omitted). Under a plain language interpretation, “[e]ach term in a statute should be interpreted according to its usual and commonly accepted meaning.” *State v. Paul*, 860 P.2d 992, 993 (Utah App. 1993).

Defendant’s conduct does not fit within the limited plain language of section 76-5-102.6—assault on a correctional officer. Section 76-5-102.6 provides that “[a]ny prisoner who *throws or otherwise propels* fecal material or any other substance or object at a peace or correctional officer is guilty of a class A misdemeanor. Utah Code Ann. § 76-5-102.6 (1999) (emphasis added). Here, by his own admission, defendant did not “throw” or “propel” anything at the deputy. Rather, defendant admitted that he only “knocked over,” “pushed over,” “picked up,” “tipped,” “overturned,” or “flipped” the

table into Deputy Knapp's lap and then used the table to force the deputy into the wall.

See R. 144:125, 128, 135-37, 142.

In *State v. Paul*, 860 P.2d 992 (Utah App. 1993), this Court held that “[t]he only way a prisoner can assault a correctional officer under [section 76-5-102.6] is to ‘throw’ something at the officer.” *Id.* at 994. For purposes of section 76-5-102.6, this Court defined “throw” according to its commonly understood meaning: “(1) ‘to propel through the air by means of a sudden straightening or whirling of the arm,’ *Webster’s Illustrated Contemporary Dictionary* 768 (1982); (2) ‘to propel through the air with a swift motion of the arm,’ *The American Heritage Dictionary* 1314 (2d ed. 1985); and (3) ‘to send through the air with a motion of the hand or arm,’ *Roget’s II, The New Thesaurus* 1012 (expanded ed. 1988).” *Paul*, 860 P.2d at 993-94 (also noting that “[t]he only way a prisoner can assault a correctional officer under [section 76-5-102.6] is to ‘throw’ something at the officer.”). Similarly, the word “propel” is defined as “to impel forward or onward.” *Webster’s Third New International Dictionary* 1817 (1993). See also *Paul*, 860, P.2d at 994 (“Under the plain language of [section 76-5-102.6], the only prohibited means of propelling a[n] . . . object is by the act of throwing.”).

Given *Paul* and defendant’s own testimony, he did not “throw” or “propel” anything. Accordingly, his conduct does not fit within the elements of assault on a correctional officer. Therefore, the trial court did not err in denying defendant motion to amend the information.

B. Defendant's conduct more specifically falls under the assault by prisoner statute.

Defendant's claim also fails because his conduct went well beyond that of assault on a correctional officer. Although entitled "Assault on a correctional officer," the assault element in section 76-5-102.6 is limited to a prisoner who "*throws or otherwise propels . . . any . . . object at a peace or correctional officer[.]*" Utah Code Ann. § 76-5-102.6 (1999) (emphasis added); *Paul*, 860 P.2d at 994. By contrast, the assault element of the assault by prisoner statute is much broader, encompassing "[a]ny prisoner who *commits assault*, intending to cause bodily injury[.]" Utah Code Ann. § 76-5-102.6 (1999) (emphasis added). Assault is defined as either "(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or (c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another." Utah Code Ann. § 76-5-102 (Supp. 2001).

Here, defendant threatened Deputy Knapp that "you will be in a fight, if you start this shit[.]" and then that he would "break [his] neck, straight up[.]" and kick his "f[uck]ing ass." R. 144:63-66, 106. Defendant accompanied that threat by an immediate show of violence by tipping the table onto the deputy's lap and then using the table to slam the deputy against the back wall. *See* R. 144-67-68; Utah Code Ann. § 76-5-102.6 (1999); Utah Code Ann. § 76-5-102 (Supp. 2001). Clearly, defendant's threats went beyond the limited elements of section 76-5-102.5. *See* Utah Code Ann. 76-5-102.5 (1999). Additionally, defendant's further act of using the table and driving his legs

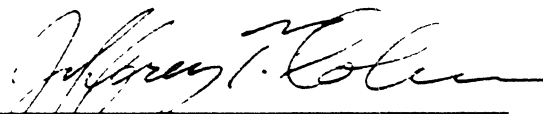
forward to slam the deputy into the wall constituted “an act, committed with unlawful force or violence, that . . . creates a substantial risk of bodily injury to [the deputy.]” *See* R. 144-67-68; Utah Code Ann. § 76-5-102.5 (1999); Utah Code Ann. § 76-5-102.6 (1999); Utah Code Ann. § 76-5-102 (Supp. 2001). As the jury found, defendant’s threats followed up by using the table to slam the deputy into the wall, evinced an intent to cause bodily injury. Thus, defendant’s conduct clearly fell outside the limited elements of assault on a correctional officer, and fell squarely within the elements of assault by prisoner. Accordingly, the trial court did not err in denying defendant’s request to amend the information to the lesser charge.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the trial court’s ruling denying defendant’s motion to amend his charge of assault by prisoner to the lesser included offense of assault on a correctional officer.

Dated this 8th day of May, 2002.

MARK L. SHURTLEFF
Utah Attorney General

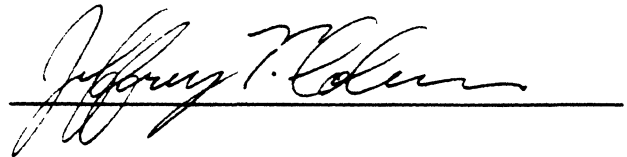


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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2002, I served two copies of the attached Brief of Appellee upon the defendant/appellant, DANIEL DUANE ETHERINGTON II, by causing the same to be [] hand delivered [☒] mailed, via first class mail, postage prepaid, to his/her counsel of record, as follows:

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A handwritten signature in cursive script, appearing to read "Jeffrey T. Coleman", is written over a horizontal line.